

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LORENZO FOSSELMAN,) 1:05-CV-0119 AWI SMS HC
Petitioner,)
v.) FINDINGS AND RECOMMENDATION
RICHARD J. KIRKLAND, Warden,) REGARDING PETITIONER'S NOTICE OF
Respondent.) APPEAL

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On August 15, 2005, Petitioner filed a notice of appeal of the undersigned's August 2, 2005, order denying Petitioner's motion for stay of the proceedings. The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

5 This Court finds that a certificate of appealability should not issue in this case. An appeal is
6 only allowed in certain circumstances. Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). In this
7 instance, Petitioner does not seek to appeal a final judgment pursuant to 28 U.S.C. § 2253. Rather,
8 he seeks to appeal the undersigned's non-dispositive order directly to the Ninth Circuit, which is
9 inappropriate. See Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir.1996); 28 U.S.C.
10 § 1291; 28 U.S.C. § 636(b)(1)(A).

RECOMMENDATION

12 Accordingly, the Court RECOMMENDS that the District Court DECLINE to issue a
13 certificate of appealability in this instance.

14 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United
15 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304
16 of the Local Rules of Practice for the United States District Court, Eastern District of California.
17 Within fifteen (15) days after being served with a copy of this Findings and Recommendation, any
18 party may file written objections with the Court and serve a copy on all parties. Such a document
19 should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to
20 the Objections shall be served and filed within ten (10) court days (plus three days if served by mail)
21 after service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to
22 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified
23 time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153
24 (9th Cir. 1991).

25 || IT IS SO ORDERED.

26 | Dated: August 24, 2005
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/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE